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Criminal Law--Court-Martialed Convictions--Second-Offender Statute

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CRIMINAL LAW — COURT-MARTIAL CONVICTION — SECOND-OFFENDER STATUTE. — *D*, having been previously convicted in a court-martial proceeding for refusing to obey an order to carry coal and sentenced to imprisonment in the Disciplinary Barracks, was convicted of a felony¹ and was sentenced to confinement in the penitentiary for a term of not less than one nor more than ten years, at the expiration of which term his imprisonment to continue, under the second-offender statute,² for an additional five-year term, due to the previous conviction. *Held*, that a previous conviction of fifteen years in a court-martial proceeding is not a like punishment within the meaning of the statute. *State v. Wheeler*.³

Although the West Virginia statute existed without change from the formation of the state until 1939,⁴ this case is the first to involve a previous court-martial conviction. With a large body of men subjected to military law and punishment today, this case may become of increasing importance. Only one similar case elsewhere has been found. In the case of *People v. Wilson*,⁵ a conviction by a court-martial for sodomy was held to be a "previous conviction" within the meaning of the New York second-offender statute.⁶ This

¹ Fraudulently obtaining a signature to a certificate of nomination. W. VA. CODE (Michie, 1937) c. 3, art. 7, § 1.

² "When any person is convicted of an offense, and sentenced to confinement therefor in the penitentiary, and it is alleged in the indictment on which the person is convicted, and admitted, or by the jury found, that the person has been before convicted in the United States of a crime punishable by imprisonment in a penitentiary, the court shall, if the sentence to be imposed is for a definite term of years, add five years to the time for which the person is or would be otherwise sentenced. Whenever in such case the court imposes an indeterminate sentence, five years shall be added to the maximum term of imprisonment otherwise provided for under such sentence." W. VA. ACTS 1939, c. 126, art. 11, § 18. This act changed the statute which had previously read "that he had been before sentenced in the United States to a like punishment, he shall be sentenced to be confined five years in addition to the time which he is or would be otherwise sentenced." W. VA. CODE (Michie, 1937) c. 61, art. 11, § 18. This change emphasizes the meaning of the term "like punishment" to mean previous conviction to confinement in the penitentiary. The act changes the requirements from previous "sentence" to confinement in the penitentiary to a previous "conviction" of a crime punishable by imprisonment in the penitentiary. The syllabus of the principal case is couched in terms of the statute before the change, although the case arose after it had been changed.

³ 14 S. E. (2d) 677 (W. Va. 1941).

⁴ See amendment in note 2, *supra*. The statute before change may be found in its precise wording in VA. CODE (1849) c. 199, § 25; VA. CODE (1860) c. 199, § 25; W. VA. CODE (1868) c. 152, § 23; W. VA. CODE (Barnes, 1923) c. 152, § 23; W. VA. REV. CODE (1931) c. 61, art. 11, § 18.

⁵ 257 App. Div. 555, 13 N. Y. S. (2d) 749 (1939).

⁶ GILBERT, CRIMINAL CODE AND PENAL LAW, NEW YORK (21st ed. 1938) § 1941.

case may be distinguished, however, as the prior offense is a felony⁷ punishable both by military and civil law, while in the principal case the prior offense is neither a felony nor is it punishable by civil law.

The theory which underlies habitual criminal statutes is to protect society by imposing more severe punishment for a second offense which is deemed to be evidence of "the incorrigible and dangerous character"⁸ of the accused. It is submitted that *D*'s infraction of military rules was not such a previous crime as to show a criminal tendency.

Further, could punishment for such an offense in the Disciplinary Barracks be a previous conviction within the meaning of a statute which contemplates a previous offense punishable in the penitentiary, especially when the statute being highly penal is to be construed strictly in favor of the accused?⁹ The court-martial,¹⁰ forming no part of the judicial system of the United States but rather belonging to the executive branch of government,¹¹ has discretion to confine the prisoner "in any United States, Territorial, or District penitentiary . . . or in the United States Disciplinary Barracks",¹² but the forty-second Article of War prohibits punishment by confinement in the penitentiary *unless the offense is recognized as an offense of a civil nature and is so punishable by penitentiary confinement* for more than one year by some statute of the United States.¹³ Thus, there is a distinction between punishment in the penitentiary and in the Disciplinary Barracks.¹⁴

⁷ Sodomy is a felony in New York. *Id.* at § 690. Sodomy is a felony at common law. 4 BL. COMM. 215.

⁸ 1 BISHOP, CRIMINAL LAW (9th ed. 1923) § 993a. See also *State v. Graham*, 68 W. Va. 248, 69 S. E. 1010 (1910); *State v. Stout*, 116 W. Va. 398, 180 S. E. 443 (1935); and McCuaig, *Modern Tendencies in Habitual Criminal Legislation* (1929) 15 Corn. L. Q. 62.

⁹ *Hall v. Norfolk & Western R. R.*, 44 W. Va. 36, 28 S. E. 754 (1897); *Diddle v. Continental Casualty Co.*, 65 W. Va. 170, 63 S. E. 962 (1909).

¹⁰ The court-martial is "A military court, convened under authority of the government and articles of war, for trying and punishing military offenses committed by soldiers . . . in the army. Such courts have jurisdiction by virtue of military law, . . . empowered by authority from a commanding officer." BLACK, LAW DICTIONARY (3d ed. 1933) 460.

¹¹ *Kurtz v. Moffitt*, 115 U. S. 487, 6 S. Ct. 148, 29 L. Ed. 458 (1885); *Dynes v. Hoover*, 20 How. 65, 15 L. Ed. 838 (U. S. 1857); *State v. Nuchols*, 18 N. D. 233, 119 N. W. 632 (1909); *State v. Peake*, 22 N. D. 457, 135 N. W. 197 (1912).

¹² 38 STAT. 1084, 10 U. S. C. A. § 1452 (1915).

¹³ 41 STAT. 795, 10 U. S. C. A. § 1513 (1920).

¹⁴ This distinction is emphasized by designation of the place of confinement at Fort Leavenworth as the United States Disciplinary Barracks, and not the penitentiary. 38 STAT. 1084, 10 U. S. C. A. § 1451 (1915).

The court leaves open the question of whether the statute contemplates only a previous conviction of a felony under the law of West Virginia, or is all-embracing of felonies under any law. A further question remains whether a sentence by court-martial to the United States penitentiary instead of to confinement in the Disciplinary Barracks would have met the requirements of our statute, which only requires a previous conviction of a crime punishable in a penitentiary.

M. S. K.

DEEDS — CONSTRUCTION AS TO GRANTEES — OFFICIAL OR REPRESENTATIVE CAPACITY. — *A*, as receiver of the *X* National Bank, sold several tracts of land to *B* at a public sale. *B* later refused the conveyance on the ground that *A* had no title to the land sold. The property had been purchased by *A*'s predecessor in office at a sale to enforce the bank's lien thereon, the conveyance having been made to "*C*, Receiver of the *X* National Bank, an insolvent national banking association." *B* demurred to *A*'s bill for specific performance. *Held*, that such a deed conveys the land to the grantee in his individual capacity, and "Receiver of the *X* National Bank", etc., is only *descriptio personae*. *Hardesty v. Fairmont Supply Co.*¹

The court announced that it was merely following the rule laid down in *Donahue v. Rafferty* and *Hyman v. Swint*,² two earlier West Virginia cases. The former decision did not specifically concern the construction of a deed, but of certain other papers; yet it was held therein that the designation "Rt. Rev. P. J. Donahue, Bishop of Wheeling" was not inconsistent with a fee in Donahue personally. *Hyman v. Swint* arose on a demurrer, the actual holding being that there was nothing in a conveyance to the "Rt. Rev. P. J. Donahue, Bishop of Wheeling" which contradicted the averment in the bill that Donahue held title to the property in his individual capacity. However, the general statement was made that "where property is conveyed to one whose name in the deed is followed simply by his title or name in office, the legal title vests in him individually."³ This generalization may not have been warranted by either the facts or the holding in that particular litigation.⁴

¹ 14 S. E. (2d) 436 (W. Va. 1941).

² *Donahue v. Rafferty*, 82 W. Va. 535, 96 S. E. 935 (1918); *Hyman v. Swint*, 94 W. Va. 627, 119 S. E. 866 (1923).

³ 94 W. Va. at 633.

⁴ In *Rinehart v. Ireland*, 120 W. Va. 599, 199 S. E. 871 (1938), the result appears to be that a conveyance to "E. A. Rinehart, Reciver of Y County